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July 15, 2019

Via E-mail (Daniel.Rogan@hennepin.us)

Dan Rogan
Hennepin County Attorney's Office
Hennepin County Government Center
300 South 6th St
Minneapolis, MN 55487

Re: Hennepin County Board of Commissioner's June 17 Closed Session

Dear Attorney Rogan,

As you know, I represent Star Tribune Media Company LLC. I write regarding the June 17 meeting of the Hennepin County Board of Commissioners, which the Board closed to the public, citing Minn. Stat. § 383B.217. That statute allows the Board to "meet in closed session to discuss and take action on specific products or services that are in direct competition with other providers of goods or services in the public or private sector, if disclosure of information pertaining to those matters would clearly harm the competitive position of the HMO or Hennepin Healthcare System, Inc."

However, before closing the meeting the Board was required—but failed—to comply with the Open Meeting Law and its requirement that "before closing a meeting, a public body shall state on the record the *specific grounds* permitting the meeting to be closed and describe *the subject* to be discussed." Minn. Stat. § 13D.01 subd. 3 (emphasis added).

During the brief public portion of the meeting, you stated, on behalf of the Board, that you had reviewed the meeting agenda and the materials attached to it and that you believed the materials were "competitive data" and the meeting could thus be closed under Minn. Stat. § 383B.217. Star Tribune reporter Andy Mannix recorded your remarks and the vote to close the meeting and we are happy to provide the recording if you do not recollect what transpired.

After your remarks, the Board voted to close the meeting and Star Tribune reporter Andy Mannix and I left. As we were leaving I asked you if the County Attorney's Office would be providing a written opinion providing further explanation or justification for the closure and you said no. We have since looked on the Board's website for an agenda for the meeting and have found only the notice of the meeting, which states that the Board is meeting to

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“consider HHS strategy.” See <https://www.hennepinhealthcare.org/wp-content/uploads/2019/06/Notice-of-Special-Meeting-of-HHS-board-20190617-V2-time-change.pdf>. If there was some agenda beyond this notice, please advise. Star Tribune does not have access to the materials attached to the agenda that you referenced in your remarks on June 17.

In any event, the Board’s explanation for closure of the June 17 meeting did not comply with Minn. Stat. § 13D.01 subd. 3 and its requirement that a public entity provide not only the grounds for closing the meeting but also the subject to be discussed. *See Free Press v. County of Blue Earth*, 677 N.W.2d 471, 475 (Minn. App. 2004). In that case, the Blue Earth County Board of Commissioners went into closed session to “under the attorney-client privilege to discuss pending litigation.” It argued that it complied with Minn. Stat. § 13D.01 subd. 3 merely by invoking the attorney-client exception to the open meeting law. The court rejected this argument, stating:

“Grounds,” as defined by Black’s Law Dictionary, are “the reasons or points that something (as a legal claim or argument) relies on for validity.” Black’s Law Dictionary at 710 (7th ed. 1999). “Subject,” on the other hand, refers to “the matter of concern over which something is created.” *Id.* at 1438. Contrary to the county’s argument, “attorney-client privilege,” as recited in section 13D.05, subdivision 3(b), does not suffice as the “subject to be discussed” required by section 13D.01, subdivision 3; clearly, the county’s assertion of that privilege was the “grounds” for closing the meeting. And the assertion of that privilege alone is legally insufficient to meet the statutory requirement of section 13D.01, subdivision 3. The county also maintains that it further defined the subject to be discussed as “pending litigation.” We recognize that by providing this information the county identified the subject to be discussed, but section 13D.01, subdivision 3 requires a public body to “describe the subject to be discussed.” (Emphasis added.) Again, the county’s actions failed to satisfy the statutory requirement, because they lacked a ***particularized statement*** describing the subject to be discussed.

Id. at 476 (emphasis added). Subsequent opinions from the Commissioner of the Department of Administration have shed light on what constitutes a “particularized statement.” *See, e.g.,* Information Policy Analysis Division Op. No. 17-0303 (“The Council stated that it was closing the meeting on the basis of the attorney-client privilege exception; therefore, it met the requirement to state the specific grounds permitting the meeting to be closed. If the Council provided the additional statement regarding ‘code violations at 407 Lake Avenue,’ then it satisfied the second part of the requirement. If the Council did not provide the ***particularized description of the subject***, then it did not satisfy the requirement” (emphasis added).).

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The Board's explanation for closing the June 17 meeting was indistinguishable from the sort of explanation the Court of Appeals found insufficient in *Free Press*: it invoked Minn. Stat. § 383B.217 and alluded to "competitive data" but did not identify the "specific products or services" it would be discussing, and it certainly did not provide a "particularized statement" of the subject(s) it planned to discuss with regard to those specific products or services.

Please identify the products and services discussed at the June 17 closed meeting and a particularized statement describing the issues discussed as to those products and services as soon as possible but no later than July 19.

Sincerely,



Leita Walker
Partner

LW/rtw